No. 96335-5
[Ninth Circuit No. 16-35205]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN

CASEY TAYLOR and ANGELINA TAYLOR, husband and wife and the marital community composed thereof,

Plaintiffs-Appellants,

v.

BURLINGTON NORTHERN RAILROAD HOLDINGS, INC., a Delaware Corporation licensed to do business in the State of Washington, and BNSF RAILWAY COMPANY, a Delaware Corporation licensed to do business in the State of Washington,

Defendants-Respondents.

BRIEF OFAMICI CURIAE AARP AND AARP FOUNDATION ON CERTIFIED QUESTION

Michael Subit, WSBA #29189
FRANK FREED SUBIT & THOMAS LLP
705 2nd Avenue, Suite 1200
Seattle, WA 98104-1798
Telephone: (206) 682-6711
Facsimile: (206) 682-0401
msubit@frankfreed.com

Daniel B. Kohrman, DC Bar #394064
AARP FOUNDATION LITIGATION
601 E Street, NW, Room S11-230
Washington, DC 20049
Telephone: (202) 434-2064
Facsimile: (202) 434-6424
dkohrman@aarp.org

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INTRODUCTION

The question certified to this Court by the U.S. Court of Appeals for the Ninth Circuit is:

> Under what circumstances, if any, does obesity qualify as an "impairment" under the Washington Law Against Discrimination (WLAD), Wash. Rev. Code § 49.60.040.

Taylor v. Burlington N. R.R. Holdings, Inc., 904 F.3d 846, 853 (9th Cir. 2018). The Ninth Circuit said that in answering this question, the Court "may wish to consider the treatment of obesity under the ADA." *Id.* at 850 (referencing the Americans with Disabilities Act of 1990, 42 U.S.C. §§12101, et seq. (2012), as amended by the ADA Amendments Act of 2008 ("ADAAA"), Pub. L. No. 110-325 (Sept. 25, 2008)). Moreover, the Ninth Circuit discussed the "regulation issued by the Equal Employment Opportunity Commission (EEOC) defin[ing] 'impairment'" under the ADA, *see* 29 C.F.R. § 1630.2(h), and suggested that this Court "may wish to consider the EEOC's interpretation of this regulation through interpretive guidance it has issued." *Taylor*, 904 F.3d at 850. Defendants-Respondents (BNSF) rely heavily on their interpretation of the ADA and, especially, the EEOC's ADA guidance, in arguing that obesity may never be an impairment under the WLAD.

Due to the breadth and clarity of the WLAD's text, of decisions under that law, and of the legislative and administrative intent expressed in the WLAD's enactment and implementation records, the Court need not address ADA law to answer the certified question. In this, amici agree with the Plaintiffs/Appellants and amicus WELA.[1]

Yet, in light of BNSF's focus on the ADA, amici respond below to the railroad's mischaracterizing of federal law as mandating exclusion of obesity as an impairment and, further, application of the same interpretation to the WLAD. While it is true that the WLAD's "coverage [is] broader" than the ADA's, *Taylor*, 904 F.3d at 853, it is not true, at least with respect to "regarded as" disability claims involving obesity, that the ADA's coverage is narrow. The ADA's text and regulations reinforce a conclusion that obesity generally, and especially extreme obesity, is a covered impairment, even under federal law. To the degree this Court even considers federal law in interpreting the WLAD, this Court should not give credence to outdated, restrictive ADA court decisions or irrelevant, non-binding EEOC ADA guidance that suggest otherwise. Both errantly conflate the "physical characteristic" of "weight" with the medical "condition" of

[1] Hence, amici do not address WLAD coverage of obesity in any detail, but, rather, focus on issues of the possible relevance of ADA law to the Court's answer to the certified question.

obesity. BNSF stresses these sources in service of its faulty case that "narrow" ADA coverage of obesity mandates a similar cramped view of the WLAD. The railroad's ADA arguments are meritless.

IDENTITY AND INTERESTS OF AMICI CURIAE

AARP is the largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members, and with offices in every state, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

In the courts, AARP and AARP Foundation seek proper interpretation of federal and state laws protecting older workers, such as the ADA and the WLAD. About one-third of AARP members work full- or part-time; others are seeking employment. Addressing obesity as a WLAD and ADA impairment is highly relevant to the AARP Amici, as adults over age 40 experience disproportionate rates of obesity.[2]

[2] Centers for Disease Control and Prevention, *Obesity Facts* (June 12, 2018), https://www.cdc.gov/obesity/data/adult.html.

SUMMARY OF ARGUMENT

While Amici submit that the Court need not look to federal law to address the certified question, to the extent this Court deems it pertinent to do so, the text of the ADA and its regulations suffice to show that Casey Taylor's severe obesity is a viable "regarded as" ADA-covered "impairment." This reinforces the broader conclusion, compelled by Washington law, that obesity always should be a WLAD "impairment."

BNSF greatly overstates the deference this Court owes to EEOC policy guidance under the ADA and federal court decisions relying on it. Such authorities, addressing the "physical characteristic" of "weight," are irrelevant in construing the WLAD's application to the medical "condition" of obesity. Likewise, the significance of such authorities in assessing coverage of the medical condition of obesity as an ADA or WLAD impairment has been further eroded by developments in the law—Congress' enactment of the ADAAA—and in medical science. The latter are reflected in a strong, growing medical consensus that obesity generally, and especially extreme obesity, are conditions that materially affect multiple body systems.

ARGUMENT

This Court, If Considering Federal Law in Answering the Certified Question, Should Look No Further Than the Text of the ADA and Its Regulations.

A. The ADA and Its Regulations Support a Finding that Obesity and, in Particular, Extreme Obesity, Is A WLAD Impairment.

In the ADA Amendments Act of 2008 ("ADAAA"), Pub. L. No. 110-325 (Sept. 25, 2008), Congress required that the term "disability . . . be construed in favor of broad coverage of individuals . . . to the maximum extent permitted by the terms of this chapter." 42 U.S.C. § 12102(4)(A); *see also* 29 C.F.R. § 1630.1(c)(4). Congress also said "that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." 42 U.S.C. § 12101 (note) (ADAAA, § 2(b)(5)); *see also* 29 C.F.R. §§ 1630.1(c)(4). BNSF's cramped reading of an WLAD "impairment," supposedly based on ADA authority, cannot be reconciled with either precept.

Moreover, this case proceeds within the special context of a "regarded as" claim. Pre-ADAAA, "except in rare circumstances, obesity [wa]s not considered a disabling impairment," 56 Fed. Reg. 35,726, 35,741 (July 26, 1991), due to a "strict" duty to show that every ADA impairment

substantially limited major life activities.[3] The ADAAA changed this in "regarded as" cases, by removing the "substantially limits" requirement. 42 U.S.C. § 12102(1)(A), (3)(A).[4] A "regarded as" disability now may be shown simply by evidence of an impairment, *regardless of its severity. See* 42 U.S.C. §§ 12101 (note) (ADAAA § 4(a)), 12102(3)(A).[5]

Furthermore, under the 2008 ADA amendments, plaintiffs only may claim a "regarded as" disability if, like the Taylors, they do not seek "reasonable accommodation." *See* 42 U.S.C. § 12201(h). Accordingly, Congress determined that "[c]overage under the 'regarded as' prong of the definition of disability should not be difficult to establish." 29 C.F.R. Pt. 1630, App. § 1630.2(l) (citing legislative history). Thus, "regarded as" claims, as here, are fundamental to fulfilling the ADAAA goal to make proving disability easier. *Id.* In short, this case is precisely the context in which the ADA favors broad, not narrow, coverage.

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[3] Under *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002), overruled by the ADAAA, "substantially limits" had "to be interpreted strictly to create a demanding standard."

[4] To be sure, ADA actual disability and "record of" disability claims still must meet a "substantially limits" test, *see id.* § 12102(1)(A), (B), albeit one that is more lenient.

[5] *Accord, e.g., Thoma v. City of Spokane*, No. CV-12-0156-EFS, 2013 U.S. Dist. LEXIS 48562, at *14-15 (E.D. Wash. Apr. 3, 2013) (denying defense motion for partial summary judgment and noting that the ADAAA "made it significantly easier for a plaintiff to bring a regarded-as claim … now, a plaintiff may demonstrate a disability by establishing that he was terminated because of an actual or perceived physical or mental impairment, regardless of how significant that impairment was or was perceived to be.").

Broad interpretation of the term "impairment" in this case also is proper given a strong and growing medical consensus that obesity has significant effects on multiple major body systems, *see* Brief of Amici Curiae Obesity Action Council, et al. ("OAC Brief"), § III. B. (discussing medical literature documenting effects of obesity on the circulatory, cardiovascular, musculoskeletal, lymphatic, and endocrine systems). Such effects likely qualify most ADA claims based on obesity, especially those involving "extreme" obesity, as demonstrating a covered "impairment" under the EEOC's definition: "[any] . . . disorder or condition . . . affecting one of more body systems." 29 C.F.R. § 1630.2(h)(1).[6] The ADA regulation's lack of ambiguity rules out cause to "defer to," or "to consider," the EEOC's "interpretation of this regulation through interpretive guidance it has issued." *Taylor*, 904 F.3d at 850.

[6] The remaining "substantially limits" requirement for some (i.e., all non-"regarded as") ADA claims is a reason why *it cannot be said that under the ADA, obesity always will be* a covered "impairment" and, thus, *a covered "disability,"* as WELA and Plaintiffs/ Appellants explain obesity should be under the WLAD. That said, because of medical evidence of obesity's effects on multiple body systems, a strong argument exists that "the individualized assessment" the ADA requires of all impairments "will, in virtually all cases, result in a determination of coverage" of obesity as a "disability," at least for "regarded as" claims, in which a mere impairment, not a "substantially limit[ing]" impairment is required. See 29 C.F.R. § 1630.2(j)(3) ("Predictable assessments").

B. The ADA Authorities on Which BNSF Relies Are Neither Relevant Nor Persuasive in Answering the Certified Question.

BNSF's reliance on ADA authorities is highly skewed. The railroad largely ignores the ADA's text, as amended in 2008, and that of the EEOC's regulation defining "impairment," in favor of non-relevant text BNSF prefers in the agency's ADA guidance.

On its face, this guidance text concerns "weight" and other "physical . . . characteristics that are not impairments" rather than "conditions that are impairments," such as obesity, especially extreme obesity. 29 C.F.R. Pt. 1630, App. § 1630.2(h). This alone renders the guidance inapplicable to obesity as it is currently commonly understood, as a physiological "disorder or condition" that affects multiple "body systems." *Id.*, § 1630.2(h)(1).

BNSF fixates on the EEOC's suggestion that physical characteristics, "such as eye color, hair color, left handedness, or height, weight or muscle tone" may not be impairments if they are "within 'normal' range' and *are not the result of a physiological disorder*." *Id.* (emphasis added). BNSF interprets this to require obese claimants to show a separate, independent, underlying "physiological disorder"—other than obesity itself—while EEOC interprets its own guidance differently, to establish an impairment in instances of extreme obesity—i.e., outside the normal range—and even in instances within normal range if a claimant can also

show a separate underlying disorder. *See Taylor*, 904 F.3d at 852 (explaining divergent readings of the EEOC guidance).

Amici submit that this debate is a blind alley distracting from the clear language of the ADA and its regulation defining "regarded as" disabilities consisting of perceived medical conditions.

In the first place, BNSF repeatedly contends, without explanation and in defiance of countless reputable medical authorities, that excess weight and obesity are the same thing. *Compare* Brief of Appellees at 7 (stating, uncited, that "'[o]besity' is a medicalized term for having *more* body weight than many doctors currently think healthy.") *with id.* (quoting plaintiffs' cite to a World Health Organization definition: "[o]besity is an '*abnormal* or *excessive* fat accumulation that *presents* a *risk* to health."); *see also id.* at 15 (using "obesity" and "body weight" interchangeably), 22 (saying "obesity" is another "label[]" for "weight"). They are not. *See generally*, OAC Brief. Thus, the EEOC's "weight" guidance is properly dismissed as irrelevant to an obesity-based claim of disability.

Just as flawed is BNSF's reliance on federal appellate decisions citing the EEOC's weight guidance. Most of these cases, like this one, arose from challenges to strict numerical weight restrictions.[7] Yet the plaintiffs in

[7] *See Francis v. City of Meriden*, 129 F.3d 281, 285 (2d Cir. 1997); *Andrews v. Ohio*, 104 F.3d 803, 805 (6th Cir. 1997); *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104, 1106 (8th Cir.

these cases—unlike the Taylors here—only asserted that an employer "regarded [them] as" disabled by subjecting them to adverse action for noncompliance with a weight standard. *See Morriss v. BNSF Ry. Co.,* 817 F.3d 1104, 1106-07 (8th Cir. 2016) (plaintiff claimed that his weight-based exclusion showed that BNSF regarded his elevated BMI as an impairment); *Andrews v. Ohio,* 104 F.3d 803, 808 (6th Cir. 1997) ("the officers . . . averred that Ohio perceives them to be impaired based upon excessive weight and lack of cardio-respiratory endurance and strength"); *Francis v. City of Meriden,* 129 F.3d 281, 282-83 (2d Cir. 1997) (plaintiff challenged discipline imposed on him for "being overweight," alleging this "showed a perception that he had a disability"); *EEOC v. Watkins Motor Lines, Inc.,* 463 F.3d 436, 442 (6th Cir. 2006) (analysis closely tracking *Andrews* and *Francis).* Here, BNSF diagnosed Casey Taylor as having "extreme obesity," a medical condition. *Taylor,* 904 F.3d at 848.[8]

Confusion of the medical condition of obesity with the physical characteristic of excessive weight, as an ADA impairment, is evident in some courts' tangled descriptions of plaintiffs' obesity. For instance, in

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2016). As the Taylors note in their brief, *Francis*, *Andrews*, and *Watkins* pre-dated the ADAAA, and *Morriss* relied on these decisions despite changes enacted in the ADAAA.

[8] BNSF's "Medical Officer" may have *assumed* Taylor's weight and height, i.e., his "Body Mass Index . . . above 40," showed he had what medical professionals consider a medical condition. Yet, if so, this simply states a typical "regarded as" claim. It does not prove BNSF acted based only on "physical characteristics."

Watkins, the Court referred to "non-physiological morbid obesity" and non-physiologically caused obesity." 463 F.3d at 439-41. The implication that obesity is something other than a physiological phenomenon is unsound. Perhaps the *Watkins* court meant to describe obesity not caused by a separate, underlying physiological condition. But such verbal contortion was unnecessary, since obesity itself is a "disorder or condition . . . affecting . . . body systems," not just a "physical characteristic."

Such confusion may derive from an outdated assumption that the term "obesity" is simply interchangeable with elevated "weight," justifying the application of the EEOC's guidance on "weight" as an impairment to both. Thus, *Morriss* erred in stating: "consistent with the EEOC's definition[,] to constitute an ADA impairment obesity, even morbid obesity, must be the result of a physiological condition." 817 F.3d at 1109 (quoting *Watkin*s, 463 F.3d at 443). Yet, there is no EEOC "definition" of when "obesity" may be an impairment, just the agency's guidance on when it believes "weight" may so qualify. Likewise, *Morriss*, following *Francis*, declared: "obesity, by itself, does not qualify as a physical impairment because 'physical characteristics that are not the result of a physiological disorder' are not considered impairments." 817 F.3d at 1109. This further nod to the EEOC's guidance again mistakes it as addressing "obesity," not "weight."

Medical authorities now agree generally as to what the First Circuit found a generation ago regarding a single individual based on expert testimony under federal anti-discrimination law in *Cook v. R.I. Dep't of Mental Health, Retardation and Hosps.*, 10 F.3d 17 (1st Cir. 1993). The *Cook* court ruled that the plaintiff's extreme obesity was an "impairment" because, on its own, it constituted "a physiological disorder involving dysfunction of both the metabolic system and the neurological appetite-suppressing signal system, capable of causing adverse effects within the musculoskeletal, respiratory, and cardiovascular systems." *Id.* at 20. Thus, *Cook* supports answering the certified question by concluding that obesity always is a WLAD "impairment."

CONCLUSION

The Court need not and should not answer the certified question based on ADA law, but, rather, should look to the clear conclusions provided by the WLAD's text and the record of its enactment and implementation. For the reasons set forth above, the Court should reject the railroad's suggestions that ADA precedent or agency guidance trump these authorities and mandate narrow coverage of the medical condition of obesity as an impairment, under both the ADA and the WLAD. To the extent the Court addresses ADA issues, it should clarify that the text of the Act and its "impairment" regulation compel broad and generous coverage

of obesity as an impairment and, further, that ADA decisions and guidance regarding the "physical characteristic" of "weight" are not to the contrary.

Respectfully submitted this 14th day of January 2019.

AARP AND AARP FOUNDATION

By: /s/ Michael Subit
Michael Subit, WSBA #29189
FRANK FREED SUBIT & THOMAS LLP

By: /s/ Daniel B. Kohrman
Daniel B. Kohrman, DC Bar #394064
Dean Graybill
William Alvarado Rivera
AARP FOUNDATION LITIGATION

FRANK FREED SUBIT & THOMAS LLP

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